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APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 610

JOHN L. SULLIVAN, Tax Commissioner of the State of Connecticut; and GERALD A. LAMB, Treasurer of the State of Connecticut; LOUIS I. GLADSTONE, Comptroller of the State of Connecticut; and ROBERT K. KILLIAN, Attorney General of the State of Connecticut,

*Appellants,*

v.

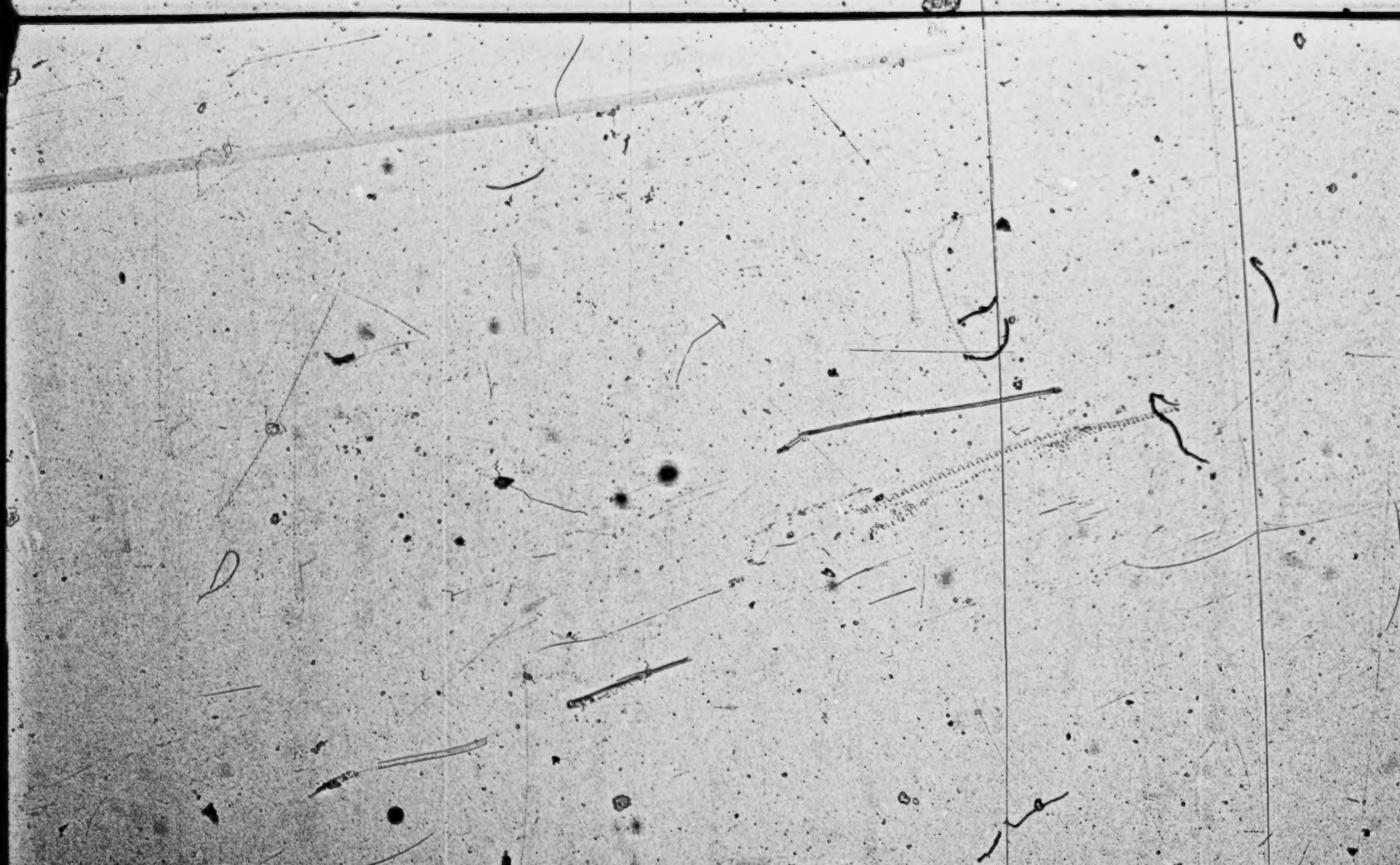
UNITED STATES OF AMERICA, ET AL

*Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appeal Docketed October 7, 1968

Jurisdiction Noted January 13, 1969



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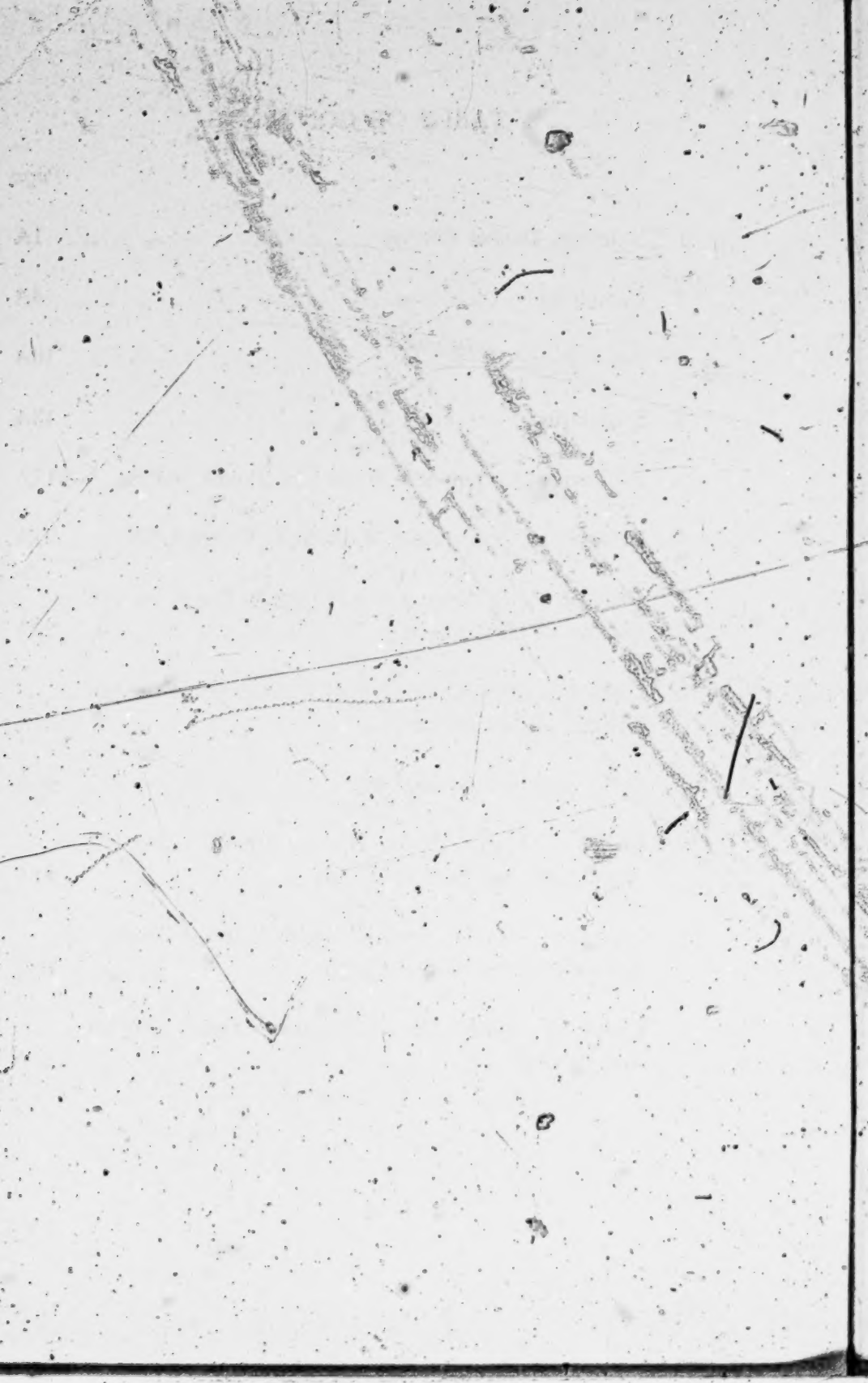

JOHN L. SULLIVAN, Tax Commissioner of the State of Connecticut; and GERALD A. LAMB, Treasurer of the State of Connecticut; LOUIS I. GLADSTONE, Comptroller of the State of Connecticut; and ROBERT K. KILLIAN, Attorney General of the State of Connecticut,

*Appellants,*

v.

UNITED STATES OF AMERICA, ET AL

*Appellees.*

## Relevant Docket Entries

* * * *

1967

4/21 Complaint filed.

" Motion for Preliminary Injunction, Notice of Motion, Affidavit of Kent J. Carroll, Commander, U.S. Navy, and Brief in Support of Motion for Temporary Injunction, filed.

* * * *

5/ 2 Motion to Dismiss for Lack of Jurisdiction Under Rule 12(b) and Notice of Motion, filed by defendants.

* * * *

5/ 8 Plaintiffs' Motion for Preliminary Injunction "over to June 5th at 2:00 P.M."

" Hearing on Defendant's (Harold M. Mulvey) Motion to Dismiss for Lack of Jurisdiction Under Rule 12(b). * * * Decision reserved on motion to Dismiss. Blumenfeld, J. * * *

* * * *

5/19 Answer, filed by Defendants.

5/29 Defendant's Brief, filed.

" Motion for Summary Judgment, Notice of Motion, Affidavits and Stipulation, filed by Plaintiffs.

* * * *

5/31 Affidavit of George T. Borrows, filed by Plaintiff.

" Affidavit of Clyde H. Shaffer, filed by Plaintiff.

6/ 5 Affidavit of John L. Sullivan, Tax Commissioner, filed.

" Affidavit of Thomas J. Ingram, III, Commander, Supply Corps, U.S.N., filed.

" Hearing on (1) Plaintiffs' Motion for Preliminary Injunction; (2) Plaintiffs' Motion for Summary Judgment. * * * Affidavit of William L. Foster, filed. * * * Decision Reserved on both motions. Blumenfeld, J.

6/28 Memorandum of Decision entered at Htfd. The Court DECREES and ADJUDGES that judgment enter declaring that each and all assessments and collections of sales or use taxes which defendants have made and are making in respect of personal property purchased or used in Connecticut by Schuman and other persons, who, at the time as of which the tax was or is levied, were or are members of the Armed Forces of the United States on active duty and residents of or domiciled in states other than Connecticut and absent from such states solely by reason of compliance with military or naval orders, were and are in contravention of the Soldiers' and Sailors' Civil Relief Act of 1940. Blumenfeld, J. * * *

6/29 Judgment entered. Ordered that each and all assessments and collections of sales or use taxes which defendants

have made and are making in respect of personal property purchased or used in Connecticut by Schuman and other persons, who, at the time as of which the tax was or is levied, were or are members of the Armed Forces of the United States on active duty and residents of or domiciled in states other than Connecticut and absent from such states solely by reason of compliance with military or naval orders, were and are in contravention of the Soldiers' and Sailors' Civil Relief Act of 1940. * * *

7/12 Motion to Amend Judgment Under Rule 59(e), with Notice of Motion to Amend Judgment Under Rule 59(e), and Affidavit of Clinton B. D. Brown, filed.

9/11 Hearing on Plaintiffs' Motion to Amend Judgment Under Rule 59(e). Decision Reserved. Blumenfeld, J. * * *

* * * *

10/ 3 Stipulation for Entry of Order and Amendment of Judgment, filed by Plaintiff.

" Order entered, amending Judgment * * * Blumenfeld, J. * * *

11/28 Notice of Appeal, to the U.S. Court of Appeals for Second Circuit, filed by Defendants. * * *

1968

7/11 Judgment entered affirming decision of the District Court.

7/30 Notice of Appeal to the Supreme Court of the United States filed by defendants.

8/20 Clerk's certificate.

8/22 Motion to stay issuance of mandate pending appeal granted.

10/ 7 Appeal docketed.

1969

1/13 Jurisdiction noted.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

*(Title Omitted in Printing)*

## COMPLAINT

Plaintiffs United States of America and Lieutenant Stanley D. Schuman, U.S.N., by their attorney, Jon O. Newman, United States Attorney for the District of Connecticut, allege that:

1. Jurisdiction is founded on the United States as a party plaintiff in this action. 28 U.S.C., § 1345.

2. The United States of America is and at all times pertinent hereto was a corporate sovereign and a body politic.

3. The United States has brought this action at the request of the Department of the Navy and under the direction and authorization of the Attorney General of the United States because of its interest, as sovereign, in having Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S. Code Appendix, Section 574), hereinafter called the "Relief Act," properly construed and the benefits thereof accorded to members of its armed forces.

4. Lieutenant Schuman is a commissioned officer in the United States Navy, and is and was, at all times since July, 1960,

a member of the armed forces of the United States on active duty and a resident of and domiciled in the State of Nebraska.

5. This action is brought pursuant to Rule 23, Federal Rules of Civil Procedure, in behalf of every person against or from whom, while a member of the armed forces of the United States on active duty and not a resident of or domiciled in the State of Connecticut, defendants or any of them have assessed or collected or threaten to assess or collect any sales or use tax in respect of his or her personal property not used in or arising from a trade or business.

6. Defendant John L. Sullivan is Tax Commissioner of the State of Connecticut charged by law with the administration of the Education, Welfare and Public Health Tax Act (Chapter 219, Connecticut General Statutes, Revision of 1958, as amended), commonly known as the "Sales and Use Tax Act" and hereinafter called the "Tax Act," under which he assessed and collected and threatens to assess and collect the taxes herein sought to be refunded and restrained.

7. Defendant Gerald A. Lamb is Treasurer of the State of Connecticut authorized by law to collect taxes levied under the Tax Act and to pay all tax refunds authorized by law, upon order of defendant Comptroller, out of any funds appropriated for the purpose.

8. Defendant Louis I. Gladstone is Comptroller of the State of Connecticut authorized by law to collect taxes levied under the Tax Act and to draw orders upon defendant Treasurer for the payment of tax refunds authorized by law.

9. Defendant Harold M. Mulvey is Attorney General of the State of Connecticut authorized by law to collect delinquent taxes levied under the Tax Act by civil action or foreclosure and to advise heads of executive departments, including defendant Tax Commissioner, upon any question of law submitted to him.

10. On or about June 6, 1966, defendant Tax Commissioner made an assessment under the Tax Act which purported to impose upon plaintiff Schuman a use tax in respect of certain tangible personal property physically located in the State of Connecticut which was not used in and did not arise from a trade or business, to wit, a boat purchased by Schuman in Connecticut for use in that state as a pleasure craft. Said assessment was in the amount of $21 tax and 53c interest, or a total of $21.53. Schuman paid said assessment involuntarily and under protest on August 15, 1966.

11. Prior to the assessment of said tax and while defendant Tax Commissioner was threatening to impose same, plaintiff Schuman, in letters to defendant's Tax Department dated April 6, 1966, and May 11, 1966, claimed exemption from said tax by reason of the Relief Act.

12. Defendant Tax Commissioner, acting through his subordinates, denied Schuman's claim of exemption in letters dated May 27, 1966, and June 20, 1966, on the ground that the exemption provided in the Relief Act applied only to personal property taxes and not to sales and use taxes levied under the Tax Act.

13. Following Schuman's payment under protest, plaintiff United States, acting through its Judge Advocate General of the Navy, informed defendant Attorney General by letter of August 30, 1966, of its view that the Relief Act exempts Schuman and others similarly situated from the tax assessed against him and suggested that defendant so advise the Tax Department.

14. Replying on September 7, 1966, defendant Attorney General declined and refused to advise the Tax Department to change its position, basing his refusal on the ground that the Relief Act was intended to apply solely to personal property taxes and not to sales and use taxes levied under the Tax Act. The Judge Advocate General of the Navy by letter of September 27, 1966, again urged defendant to reconsider his position but de-

fendant Attorney General persisted in his refusal to advise the Tax Department to afford exemption from taxes imposed by the Tax Act.

15. The imposition against Schuman or any other member of the class of any sales or use tax in respect of personal property not used in or arising from a trade or business is forbidden by the Relief Act which provides that, for the purposes of taxation in respect of personal property or the use thereof, such personal property of a nonresident serviceman shall not be deemed to be located or present in the state. The effect of this provision is to withdraw the jurisdictional basis for imposition of a sales or use tax in respect of such property, even though the property is physically present in the state at the time of its purchase or use.

16. In addition to plaintiff Schuman, there have been, are and will be for some time hereafter many other members of the class purchasing or using tangible personal property physically located in the State of Connecticut with respect to which defendants have assessed or collected or threaten to assess or collect sales and use taxes although at the time as of which the tax was or is levied, such persons were or are members of the armed forces domiciled in and residents of states other than Connecticut and absent from such states solely by reason of compliance with military or naval orders and entitled to exemption under the Relief Act from any taxation in respect of such property because not used in or arising from a trade or business.

17. Plaintiff Schuman's claims are typical of the claims of the class and involve a federal question of law common to the class. The class is so numerous that joinder of all members is impracticable, but plaintiffs will fairly and adequately protect the interests of the class.

18. The prosecution of separate actions by individual members of the class would create a risk of inconsistent adjudications which would establish incompatible standards of conduct for de-

fendants or adjudications which, as a practical matter, would be dispositive of the interests of other members not parties thereto or substantially impair or impede their ability to protect their interests.

19. In threatening to impose and imposing upon Schuman a tax under the Tax Act, notwithstanding the prohibition in the Relief Act against imposition of such a tax upon any member of Schuman's class, and in refusing to alter their position and threatening to impose and continue imposing such taxes on Schuman and others similarly situated, defendants have acted upon grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

20. The amounts at stake for individual members of the class are so small that separate suits would be impracticable and the common federal question affecting all the members of the class predominates over any questions affecting only individual members. These considerations together with the desirability of avoiding a multiplicity of actions which would impose an undue burden on the parties and the courts, render a class action superior to other available methods for the fair and efficient adjudication of the controversy.

21. Plaintiffs and other members of the class will suffer irreparable injury unless defendants are restrained, during the pendency of this action and permanently thereafter, from assessing and collecting any sales or use taxes with respect to personal property not used in or arising from a trade or business, purchased or used by Schuman or other members of the armed forces of the United States on active duty who, at the time as of which the tax was or is levied, were or are domiciled or resident outside of the State of Connecticut and absent from their residence or domicile solely by reason of compliance with military or naval orders in that, among other things, many members of the class will be unable, as a practical matter, to secure recovery after pay-

ment under protest of the taxes herein sought to be restrained because of the impracticability of separate suits, changes of duty station and other causes and, in any event, plaintiff United States, plaintiff Schuman and other members of the class will thereby be subjected to the expense and inconvenience of multiple suits in seeking recovery of or defending against such taxes and the morale and well-being of the class as members of the armed forces will be impaired.

WHEREFORE, the plaintiffs pray judgment:

1. Decreeing and adjudging that each and all assessments and collections of sales or use taxes which defendants have made and are making in respect of personal property purchased or used in Connecticut by Schuman and other persons who, at the time as of which the tax was or is levied, were or are members of the armed forces of the United States on active duty and residents of or domiciled in states other than Connecticut and absent from such states solely by reason of compliance with military or naval orders, were and are in contravention of the Soldiers' and Sailors' Civil Relief Act and, therefore, illegal, void and of no effect; and

2. Restraining and enjoining defendants and all persons acting under their authority, during the pendency of this action and permanently thereafter, from making further assessments or collections of sales or use taxes in respect of personal property not used in or arising from a trade or business, purchased or used by members of the armed forces of the United States who, at the time as of which the tax was or is levied, were or are on active duty and resident and domiciled in states other than Connecticut and absent from such states solely by reason of compliance with military or naval orders; and

3. Directing defendants to pay to plaintiff Schuman the sum of $21.53 and such additional sums as, at the time of entry of final judgment, it shall have been determined that Schuman has at any time paid as sales or use taxes collected by any defend-

ant in contravention of the Soldiers' and Sailors' Civil Relief Act, together with interest on all such sums to the date of judgment; and

4. Directing defendants to pay to each and all other members of the class such sums as it may then or thereafter be determined they have at any time paid as sales or use taxes collected by any defendant in contravention of the Soldiers' and Sailors' Civil Relief Act, together with interest on all such sums; and

5. Granting plaintiffs and members of the class such other and further relief as may be just and proper in the premises, together with their costs and disbursements.

*(Signatures of Counsel and Affidavit omitted in Printing)*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

*(Title Omitted in Printing)*

## ANSWER

1. Paragraphs 2, 3, 4, 6, 9, 11, 12, 13 and 14 of the complaint are admitted.

2. Paragraphs 1, 15, 19, and 21 of the complaint are denied.

3. So much of Paragraph 5 as alleges that this action is brought pursuant to Rule 23, Federal Rules of Civil Procedure, in behalf of every person against or from whom, while a member of the armed forces of the United States on active duty and not a resident of or domiciled in the State of Connecticut, the defendant State Tax Commissioner has assessed or collected or threatens to assess or collect sales or use tax with respect to the purchase of personal property by such person not used in or arising from

a trade or business is admitted. The implication in said Paragraph 5 that a purchase transaction is not a prerequisite to the imposition of sales or use taxes is denied.

4. So much of Paragraph 7 as alleges that defendant, Gerald A. Lamb, is Treasurer of the State of Connecticut authorized by law to pay all tax refunds authorized by law upon order of the defendant Comptroller out of funds appropriated for that purpose is admitted. So much of said Paragraph 7 as alleges that the defendant Treasurer of the State of Connecticut is authorized by law to collect taxes levied under the Tax Act is denied.

5. So much of Paragraph 8 as alleges that defendant, Louis I. Gladstone, is Comptroller of the State of Connecticut authorized by law to draw orders upon defendant Treasurer for the payment of tax refunds authorized by law is admitted. So much of said Paragraph 8 as alleges that the defendant Comptroller of the State of Connecticut is authorized by law to collect taxes levied under the Tax Act is denied.

6. So much of Paragraph 10 as alleges that on or about June 6, 1966 the defendant Tax Commissioner made an assessment under the Tax Act which imposed upon plaintiff Schuman a use tax with respect to the purchase of a boat within Connecticut for use in Connecticut as a pleasure craft, and that said assessment was in the amount of $21 tax and 53c interest, or a total of $21.53, which assessment was involuntarily paid by Schuman under protest on August 15, 1966, is admitted. The defendants are without knowledge or information sufficient to form a belief as to whether plaintiff Schuman will use the boat exclusively as a pleasure craft and not in connection with a trade or business, and leave the plaintiffs to their proof.

7. So much of Paragraph 16 as alleges that in addition to plaintiff Schuman there have been, are, and will be for some time hereafter many other members of the class purchasing for use tangible personal property with respect to the purchase for

use of which in the State of Connecticut the defendant State Tax Commissioner has assessed or collected or threatens to assess or collect sales and use taxes and that such persons at the time as of which the tax was or is levied were or are members of the armed forces domiciled in and residents of States other than Connecticut and absent from such States solely by reason of compliance with military or naval orders is admitted; the remaining allegations are denied.

8. As to the allegations in Paragraphs 17, 18, and 20, the defendants are without knowledge or information sufficient to form a belief, and leave the plaintiffs to their proof.

## AFFIRMATIVE DEFENSES

**First Defense.**

28 U.S.C.A. Section 1341 prohibits the issuance by this district court of the injunctive relief sought by the plaintiffs since the General Statutes of the State of Connecticut provide a plain, speedy and efficient remedy in the State courts. (Section 12-422.)

**Second Defense.**

Section 12-425(2), Connecticut General Statutes, limits the time within which claims for refund of taxes may be filed with the defendant Tax Commissioner. Although plaintiff Schuman is not estopped from filing a claim for refund of tax, many members of Schuman's class are estopped by the statutory limitation from filing claims for refund of taxes paid since the Tax Act became effective on July 1, 1947.

**Third Defense.**

Although plaintiff Schuman paid the tax assessment involuntarily and under protest, many members of the class paid sales and/or use taxes voluntarily and without protest and are, therefore, not entitled to seek recovery of said taxes.

**Fourth Defense.**

The United States of America, as representative of the class in the institution of this action on behalf of the members of the class, is guilty of laches in failing to assert the right to refund of sales and/or use taxes previously paid by members of the class for an unreasonable and unexplained length of time under circumstances which are prejudicial to the State of Connecticut.

*(Signatures of Counsel omitted in Printing)*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

*(Title Omitted in Printing)*

## STIPULATION

The parties to this action, by their undersigned attorneys, hereby stipulate and agree:

(a) this stipulation shall be received in evidence on the hearing herein now scheduled to be held June 5, 1967; and

(b) all facts stated in paragraphs 1 through 12 below shall be deemed true and correct for the purposes of said hearing and any other hearing or trial herein; and

(c) on any hearing and on the trial of this action, any party may offer any further evidence not inconsistent with any facts below stated; and

(d) each party reserves the right to object to the admissibility, on any appropriate ground, of any further evidence offered by any other party.

1. The United States has brought this action in behalf of certain present and former members of its armed forces be-

cause of its interest, as sovereign, in having Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S. Code Appendix, Section 574), properly construed and its benefits accorded members of the armed forces. Lieutenant Stanley D. Schuman, U.S.N. has joined as a plaintiff in his own behalf and as a member and representative of the class of servicemen for whose benefit the suit is brought. The class includes every person with respect to whose purchase for use of personal property not used in or arising from a trade or business, while a member of the armed forces on active duty and not domiciled in Connecticut, the defendants have assessed or collected or now or hereafter threaten or attempt to assess or collect any taxes under Sections 12-408, 12-411 or 12-431 of Chapter 219 of the General Statutes of Connecticut, Revision of 1958, as amended, commonly known as the Sales and Use Tax Act, and hereinafter referred to as the Tax Act.

2. The defendants are the duly elected or appointed officials of the State of Connecticut charged by law with the performance of duties incident to the assessment, collection and refund of taxes imposed under the Tax Act.

3. At all times here pertinent, plaintiff Lieutenant Stanley D. Schuman, U.S.N., was a member of the armed forces on active duty, domiciled in Nebraska and present in Connecticut in compliance with military orders.

4. In August, 1965, at Groton, Connecticut, Schuman bought a used outboard motorboat for $600 for his personal use as a pleasure craft. Schuman has used said outboard motorboat in Connecticut but did not and does not intend to and has not used said boat in any trade or business. The purchase was made from an individual not engaged in business as a dealer or retailer of boats.

5. On June 6, 1966, defendant Tax Commissioner assessed a tax against Schuman under Section 12-431 of the Tax Act, by

reason of his said purchase for use of said boat. The assessment was in the amount of $21 tax and 53¢ interest. Schuman paid the assessment involuntarily and under protest on August 15, 1966.

6. Commander Kent J. Carroll, U.S.N., a member of the class, at all times here pertinent was, and is, a member of the armed forces on active duty, domiciled in Michigan and present in Connecticut in compliance with military orders.

7. In May, 1966, at East Lyme, Connecticut, Carroll bought a used 1963 Luhrs inboard motorboat for $4900 for his personal use as a pleasure craft. Carroll has used said inboard motorboat in Connecticut but did not and does not intend to and has not used the boat in any trade or business. The purchase was made from an individual not engaged in business as a dealer or retailer of boats.

8. Defendant Tax Commissioner has demanded payment from Carroll of a tax under Section 12-431 of the Tax Act by reason of his said purchase for use of said boat. Carroll denies liability for and refuses to pay any such tax on the ground that he is a nonresident serviceman exempt from such taxes under the Soldiers' and Sailors' Civil Relief Act. Defendant threatens to assess and collect such a tax in the amount of $171.50.

9. Lieutenant Commander Clyde H. Shaffer, U.S.N., a member of the class, at all times here pertinent was, and is, a member of the armed forces on active duty, domiciled in Pennsylvania and present in Connecticut in compliance with military orders.

10. On January 10, 1967, at Groton, Connecticut, Shaffer purchased a 1967 Volkswagen automobile for $1,745 for his personal use and pleasure. Shaffer has used said Volkswagen automobile in Connecticut but did not and does not intend to and has not used the vehicle in any trade or business. The purchase was made from Weil Motors, Inc., a dealer and retailer of auto-

mobiles. Said retailer collected from Shaffer the sum of $61.08 as a tax on said purchase under the purported authority of Section 12-408(2) of the Tax Act and paid to defendant Tax Commissioner the amount of $61.08 in purported compliance with Section 12-414 of the Tax Act.

11. Most of the day-to-day purchases of tangible personal property, which includes food, clothing, toilet articles and other personal items, made by servicemen in Connecticut are made from military exchanges, and commissaries operated by the armed services on military installations.

12. Sales made by military exchanges and commissaries operated by the armed services on military installations to servicemen are not subject to any tax under the Tax Act.

DATED: May 24, 1967.

JON O. NEWMAN
*United States Attorney*

By CLINTON B. D. BROWN
Attorney for Plaintiffs

HAROLD M. MULVEY
*Attorney General*

By F. MICHAEL AHERN
*Assistant Attorney General*
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

*(Title Omitted in Printing)*

## AFFIDAVIT

STATE OF CONNECTICUT )
) ss
COUNTY OF NEW LONDON )

JEROME W. ROLOFF, being first duly sworn, deposes and says:

1. I am a commissioned officer in the armed forces of the United States with the rank of Commander, Civil Engineering Corps, United States Navy, and I have served continuously on active duty since my entry into naval service in 1942.

2. I am, and at all times here relevant have been, a resident of and domiciled in Waterford, Wisconsin.

3. I am attached to Naval Submarine Base New London, Groton, Connecticut, where I reported for duty on August 11, 1966.

4. My temporary residence or place of abode while serving in Connecticut are the public quarters located at 46 Cavalla Court aboard Naval Submarine Base New London, Groton, Connecticut. My presence in Connecticut is and has been solely to comply with official naval orders.

5. On or about August 2, 1966, I purchased a 1963 Pontiac motor vehicle for about $1800.00 in Merritt Island, Florida. At the time the before described motor vehicle was purchased, I was the Deputy Officer in Charge of Construction and attached to Patrick Air Force Base at Cocoa Beach, Florida, by official naval orders.

6. The before described vehicle was introduced into the State of Connecticut as a part of my personal effects, and has been used since its purchase for my personal use and pleasure. The before described vehicle is not now and has never been used in trade or business since purchased by me.

7. As a condition to my registering the before described vehicle in the State of Connecticut, I was required to pay (and did, in fact, pay) the difference between the tax imposed under the Connecticut Education Welfare and Public Health Tax Act of 3-½% and the Florida Sales Tax of 2%, which difference was the sum of $27.38. The tax on the before described vehicle was paid to the State of Connecticut, State Tax Department, at its New London office on May 16, 1967.

8. Attached hereto and made a part hereof are true copies of (a) a letter from the Department of Motor Vehicles, State of Florida, and (b) a receipt from the State Tax Department, State of Connecticut.

WHEREFORE, deponent as a member of the class represented in the above-entitled action requests that defendants return the tax collected.

/s/ Jerome W. Roloff
JEROME W. ROLOFF
Commander, Civil Engineering Corps, U.S. Navy

Subscribed and sworn to before me this 22nd day of May, 1967.

/s/ Richard C. Andrews

NOTARY PUBLIC
My commission expires 1 April 1971

CONFIRMED COPY

19A

STATE OF FLORIDA

# DEPARTMENT OF MOTOR VEHICLES

107 WEST GAINES STREET • TALLAHASSEE 32304

ARCH LIVINGSTON
DIRECTOR

May 8, 1967

J. W. Roloff, Commander, CEC, USN
Box 400
Naval Submarine Base New London
Groton, Connecticut 06340

Dear Sir:

In reference to your letter of May 4, 1967, our records indicate Florida Title #1094710, covering a 1963 Pontiac Coupe, Serial #963D10608, was issued in the name of Jerome W. Roloff, 95 North Poinciana Drive, Satelite Beach, Florida, on August 22, 1966, showing no lien.

The records indicate that Merritt Island Garage, Inc, PO Box 187, Merritt Island, the dealer from whom you purchased the vehicle, collected Florida sales tax in the amount of $36.50 on this transaction to you. We are unable to furnish you with a receipt showing proof that you paid the sales tax. It will be necessary that you contact Mr. W. D. Mayo, Deputy Director, Florida Revenue Commission, Carlton Building, Tallahassee, Florida, for the evidence of payment of tax.

Very truly yours,

ARCH LIVINGSTON, DIRECTOR

By: Anthony P. Prete

Anthony P. Prete
Assistant Title-Lien Supervisor

APP/mg

Certified to be a True Copy
/s/ Jerome W. Roloff

20A

TAXPAYER'S COPY

# State of Connecticut

## STATE TAX DEPARTMENT

EDUCATION, WELFARE, AND PUBLIC HEALTH TAX ACT

| | | | |
|---|---|---|---|
| PERMIT NO. | | | 419146 |
| BRANCH OFFICE | New London | | DATE 5-17-67 |
| RECEIVED OF | James E. Poli II | | |
| ADDRESS | 46 Cavalla Ct. | | |
| CITY OR TOWN | Groton Conn | | |
| CASH ✓ | CHECK | M. O. | AMOUNT 2.00 |

NAME OF BANK OR POST OFFICE

REMARKS 1963 Pontiac 2 dr. Sedan

ON MAY 10 1967

RECEIVED BY C. M. York

BU-F-232 (REVISION)

Certified to be a True Copy

/s/ Jeanne W. Roloff

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

*(Title Omitted in Printing)*

## AFFIDAVIT

WILLIAM L. FOSTER, being first duly sworn, deposes and says:

1. I am a commissioned officer in the Armed Forces of the United States serving with the rank of Commander, United States Navy, and I have served continuously with the United States Navy since my entry therein in 1940.

2. I am now and during all times pertinent herein have been domiciled in and a legal resident of McKinney, Texas.

3. I am presently serving as Commander Submarine Division Eighty-One, homeported in Groton, Connecticut, but on November 6, 1963, I was attached to the Staff of Commander Submarine Flotilla Two, located at the Naval Submarine Base New London, Groton, Connecticut.

4. On November 6, 1963, I purchased a 1964 Volkswagen sedan from Weil Motors, Inc., Groton, Connecticut.

5. Prior to delivery of the aforedescribed vehicle, and during negotiations for its purchase, I inquired as to registration and payment of taxes to the State of Texas. I was informed that inasmuch as I was a Texas resident I was required to pay a sales tax to the State of Texas prior to registration in that state of my newly acquired motor vehicle. The tax I was required to pay to the State of Connecticut was not credited against the tax due to the State of Texas.

6. Prior to delivery of the aforedescribed vehicle and while I was negotiating for its purchase, I telephoned the Connecticut State Department of Motor Vehicles, Wethersfield, Connecticut, and was referred to its Legal Department. I was informed that I

would be required to pay a tax of 3-½% to the State of Connecticut, but in view of the prospective registration of the vehicle I was about to acquire in the State of Texas, the 3-½% tax would not be a sales tax but would be a use tax. The tax which I would be required to pay to the State of Texas was not credited to the tax of 3-½% levied by the State of Connecticut.

7. I paid a sales tax to the State of Texas in the sum of $35.92 as a preliminary to registration. I paid a tax of $62.85 to the State of Connecticut, which I assumed, based upon my conversation with the Department of Motor Vehicles, to be a use tax.

8. Attached hereto and made a part of this affidavit are copies of the following documents:

(1) State Comptroller's Receipt/Tax Collector's Receipt No. 715613 covering sales or use tax of $35.92 paid to the State of Texas;

(2) Affiiant's letter to Tax Assessor-Collector, Texas Highway Department, dated 28 October 1963, with reply thereto on the reverse side;

(3) Affiant's letter to Tax Assessor-Collector, Texas Highway Department, dated 5 November 1963;

(4) Certified copy of original Bill of Sale on file at Weil Motors, Inc., Groton, Connecticut, indicating sales tax in the amount of $62.85 paid by the affiant.

/s/ William L. Foster
WILLIAM L. FOSTER
Commander, United States Navy

Subscribed and sworn to before me this 2nd day of June, 1967.

/s/ Richard C. Andrews
NOTARY PUBLIC
My commission expires: 1 April 1971

## STATE COMPTROLLER'S RECEIPT

For Motor Vehicle Sales, Use, Gift, or Transfer Tax

Name of Seller: Weil Motors Inc.,

| | |
|---|---|
| CASH, CREDIT and/or EXCHANGE PLUS TRADE IN TOTAL VALUE | 1795.85 |
| LESS TRADE IN | |
| NET VALUE | 1795.85 |
| AMOUNT OF SALE OR USE TAX | 35.92 |
| EVEN EXCHANGE TAX<br>NEW RESIDENT TAX<br>GIFT TAX | |

HOLD HERE FOR FIRST SNAP

Received amount as shown hereon, in payment of Motor Vehicle Sales, Use, Gift, New Resident Tax or Even Exchange as per article 6.01 et al on the motor vehicle described hereon.
Address communications regarding this tax to State Comptroller, Austin, Texas.

## TAX COLLECTOR'S RECEIPT FOR TITLE APPLICATION

Receipt is hereby acknowledged of fee of 75 cents and application for ORIGINAL - CORRECTED Certificate of Title

No. E715613

By Owner: William L. Foster, Address: New Brook St., Groton, Conn.,

| Year | Make | Body Style | Motor or Vehicle Identification No. |
|---|---|---|---|
| 1964 | Volkswagen | 2 Dr | 580 5711 |

Surrendered Title No.: Mfg., Ct

License No.: VM 4853

| 1st Lien Date | Amount | Name and Address of First Lien Holder |
|---|---|---|
| None | | |

| 2nd Lien Date | Amount | Name and Address of Second Lien Holder |
|---|---|---|
| None | | |

Date Issued: 11/7/63

County: COLLIN

ORIGINAL—To Applicant if no lien.
To Lien Holder if lien.

Mrs Doyle Nelson, fmcf
Tax Assessor-Collector — Deputy

TEXAS HIGHWAY DEPARTMENT

Form 31

IMPORTANT—Address any inquiry regarding your Certificate of Title to Texas Highway Department, Motor Vehicle Division, 40th and Jackson Avenue, Austin 14, Texas. ENCLOSE THIS RECEIPT.

23A

28 October 1963

Dear Mrs. Nelson,

I am buying a new Volkswagen Sedan this week, and I want to get Texas plates for it.

I would like to have any application for a Texas certificate of title, registration forms, etc.

I already have one car registered in Texas, but I can't remember all the details. I am paying $1795.85 for the Volkswagen, and I am paying $62.85 Connecticut Sales Tax. Do I have to pay any additional tax to Texas in order to register the car there?

Please send me all the details plus required forms.

Sincerely,

William L. Nelson
Cdr., U.S. Navy

11200

In reply to your letter - first, the registration, we register by weight, not knowing what your car weighs I am unable to say what the cost of registration would be, second, there is a 2% sales tax on what you paid for the car, and third, the Application for a Title is 75¢. I am enclosing the necessary papers, the Application of Title and also, the Tax Affidavit. Thanks- Also the cost for mailing your License plates

1745.85
.02
35,91 70

Sales Tax = 35.92
Registration Fee = 2.18
Application for title .75
Postage .50
39.35

MT 5762

| | Wt. | Cost. |
|---|---|---|
| Registration - Volkswagon | 1609 | 5.24 |
| " - Cadillac | 4300 | 22.70 |
| | | 27.94 |

5 November 1963

Mr. Dayl Nelson
Assessor and Collector of Taxes
Collin Co Bldg
Mckinney, Texas.

Dear Mrs. Nelson,

I enclosing Registration fee, Application for Title with fee, postage fee, and evidence to establish ownership. The fees are.

| | | |
|---|---|---|
| Sales Tax; 2% of $1795.25 | = | $35.92 |
| Registration; wt. 1643 lbs (now) | = | $ 2.12 |
| Application for Title | | $ .75 |
| Postage | | $ .50 |
| Total | | $39.35 |

Please mail license plates and Title to: COR. WILLIAM L. FOSTER, USN
New Brook St.
Groton, Conn.

Sincerely,
William L. Foster
Cdr. USN.

CAR INVOICE

VOLKSWAGEN SALES & SERVICE

**WEIL MOTORS, Inc.**
Long Hill Road Hilltop 5-7441
GROTON, CONN.

Stock # N 3196

SOLD TO William L. Foster
ADDRESS New Brook Street
Groton, Conn

DATE November 6, 1963
SALESMAN Mr. Carruthers

| MAKE | YEAR | MODEL | BODY STYLE | NEW OR USED | KEY NO. |
|---|---|---|---|---|---|
| Volkswagen | 1964 | 113 | 2 dr. Sedan | New | SU 14 |

| SERIAL NO. | MOTOR No. | ACCESSORIES & EXTRAS |
|---|---|---|
| 580 5711 | 802 4455 | Sea Blue |

INSURANCE COVERAGE INCLUDES
☐ FIRE AND THEFT ☐ PUBLIC LIABILITY — AMT.
☐ COLLISION — AMT. DEDUCT. ☐ PROPERTY DAMAGE — AMT.

OPTIONAL EQUIPMENT AND ACCESSORIES

| GROUP | DESCRIPTION | PRICE |
|---|---|---|

NEW CAR — FACTORY INSTALLED:
This is to certify that public 85-506 price sticker was attached to the new motor vehicle described above at the time of delivery.

William L. Foster

Cert. of Origin 11-12-63 E85

NEW CAR — DEALER INSTALLED:
County of New London SS: Groton, November 6, 1963
State of Connecticut
I hereby certify that the above and foregoing is a true copy of the original Bill of Sale as on file at Weil Motors, Inc.

In witness whereof, I have hereunto set my hand and the seal.

Notary

MY COMMISSION EXPIRES APRIL 1, 1966

USED CAR — TRADE-IN:

NAME OF FINANCE COMPANY:

| | |
|---|---|
| PRICE OF CAR | 1651.00 |
| TRANSPORTATION CHARGE | |
| PREP. & CONDITIONING | 20.00 |
| | 62.85 |
| SALES TAX | |
| DELIVERED PRICE | 1733.85 |
| EXTRAS: | |
| OPTIONAL EQUIP. & ACC.: | |
| FACTORY INSTALLED | |
| DEALER INSTALLED | |
| Undercoat | 30.00 |
| Radio | 75.00 |
| SV Mirror | 5.95 |
| 2 Seat Belts | 13.90 |
| TOTAL CASH PRICE | 1858.70 |
| COST OF FINANCING | |
| COST OF INSURANCE | |
| TOTAL TIME PRICE | 1858.70 |
| SETTLEMENT: | |
| DEPOSIT | 50.00 |
| CASH ON DELIVERY | 1808.70 |
| USED CAR: | None |
| YEAR / MAKE | |
| MODEL / BODY | |
| SERIAL NO. | |
| MOTOR NO. | |
| PAYMENTS: | |
| ____ AT $ ____ | |
| ____ AT $ ____ | |
| TOTAL | 1858.70 |

THE PURCHASER AUTHORIZES THE DEALER TO INSTALL THE OPTIONAL EQUIPMENT, ACCESSORIES AND SERVICES AS NOW SPECIFIED, AND TO PLACE THE ORDINANCE AS HEREIN SPECIFIED. ACKNOWLEDGES RECEIPT OF THIS CAR AND A COPY OF THIS CONTRACT.

PURCHASER'S SIGNATURE

ALWAYS SHOW SERIAL, MOTOR AND KEY NUMBER

8

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

— VS. —

JOHN L. SULLIVAN, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, Et Al

CIVIL No. 11,928

## MEMORANDUM OF DECISION

This is a suit by the United States and Lieutenant Stanley D. Schuman, U.S.N., on behalf of all nonresident or nondomiciliary military personnel now stationed in Connecticut against tax officials of the State of Connecticut. The Government seeks a judgment declaring that Connecticut's sales and use taxes (Chap. 219, Conn. Gen. Stat. § 12-406- § 12-432, Rev. of 1958, as amended) cannot be collected from nonresident servicemen in respect of property purchased or used by them in Connecticut consistently with the remedial provisions of Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 App. U.S.C. § 574 (1964) ). A refund of all sums heretofore paid to Connecticut on account of said tax by military personnel who were neither residents nor domiciliaries of this state is also sought.

By agreement of counsel, the question of jurisdiction and the application for a preliminary injunction were postponed until the hearing on the merits.

### I. Jurisdiction

The defendants, John L. Sullivan and others, public officials of the State of Connecticut, moved to dismiss the suit against them on the ground that Congress has denied to a federal court jurisdiction of such a case. The specific ground is

that this suit is barred by act of Congress, 28 U.S.C. § 1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state."

This section grew out of the act of August 21, 1937 (Chap. 726, 50 Stat. 738) which generally withdrew jurisdiction from federal district courts to enjoin the collection of a state tax. See 1A J. Moore, Federal Practice ¶0.207, p. 2283 (1959 ed.).

Assuming that § 1341 is applicable, whether "a plain, speedy and efficient remedy may be had in the courts of [this] state" in the instant case is a difficult and close question. *Compare Hillsborough Township* v. *Cromwell,* 326 U.S. 620 (1946) *with Spector Motor Serv., Inc.* v. *McLaughlin,* 323 U.S. 101 (1944). But the question whether an adequate remedy exists in the state courts is a thicket which need not be entered.

Jurisdiction of this court in the case at bar is based on the fact that the United States is a party plaintiff. 28 U.S.C. § 1345. It is settled law that the right of the United States to sue as plaintiff in a federal district court is not limited by the provisions of § 1341. *Department of Employment* v. *United States,* 385 U.S. 355, 357-58 (1966); *United States* v. *Arlington County,* 326 F. 2d 929, 931 (4th Cir. 1964). The rule in this circuit has long been to the same effect. *United States* v. *Woodworth,* 170 F. 2d 1019 (2d Cir. 1948) (Frank, C. J.); *United States* v. *City of New York,* 175 F. 2d 75 (2d Cir.), *cert. denied,* 338 U.S. 885 (1949).

The defendants have attempted to distinguish the *Department of Employment* case from the instant action on the ground that the proprietary interest of the United States in its instrumentalities (e.g., the Red Cross as in *Department of*

*Employment*) is more direct and immediate than the interest of the Government as representative of the class of its military personnel. In deciding that there was sufficient interest in the United States to sue, the Supreme Court relied upon the authoritative force of an unbroken line of authority, foremost among which was *United States* v. *Arlington County*, supra, 326 F. 2d 929. See *Department of Employment* v. *United States*, supra, 385 U.S. 355, 358, n.6. *Arlington County*, like the instant action, was a suit by the United States to declare a state personal property tax invalid as in contravention of the Soldiers' and Sailors' Civil Relief Act of 1940. Its citation by the Supreme Court constitutes approval of the proposition that the United States in its capacity as a plaintiff representative of its military personnel is not bound by the restrictions of §1341.[1]

## II.

Nor is the instant action barred by the general principle of sovereign immunity in that the State of Connecticut has not consented to this lawsuit. The sovereign immunity of a state may not be interposed as a defense when the United States is the party plaintiff. *Department of Employment* v. *United States*, supra at 358, citing *Monaco* v. *Mississippi*, 292 U.S. 313 (1934) and *Ex Parte Young*, 209 U.S. 123 (1908).

## III.

And there is no merit to the defendants' contention that the present case should more properly be considered by a three-judge district court in view of 28 U.S.C. § 2281. A three-judge court is required by § 2281 only when an injunction against the operation or execution of a state statute is sought

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[1]An interesting analysis of the reasons for the nonapplicability of § 1341 restrictions to the United States as plaintiff is to be found in the opinion of Judge Haynsworth in *United States* v. *Livingston*, 179 F. Supp. 9, 11-12 (E.D. S.C. 1959). *aff'd per curiam*, 364 U. S. 281 (1960).

"upon the ground of the unconstitutionality of such statute." This has been construed to apply only when the state statute is challenged as directly conflicting with the mandate of the Federal Constitution. The remedy sought here, if granted, will not completely paralyze the entire operation of Connecticut's statute.

It is now settled that only one judge need sit where a state statute is alleged to be inoperative because of a federal statute which the Supremacy Clause of article VI of the Constitution declares pre-emptive of the state law. *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), *overruling Kesler* v. *Department of Public Safety,* 369 U.S. 153 (1962). See *Query* v. *United States,* 316 U.S. 486 (1942).

Accordingly, the defendants' motion to dismiss the complaint because barred by the provisions of 28 U.S.C. § 1341 or for the other reasons enumerated above is denied.

## The Merits

It has never been disputed[2] during the course of this proceeding that Connecticut has been assessing and collecting sales and use taxes from nonresident servicemen on active duty in respect of personal property purchased or used by them in Connecticut, other than in a trade or business.[3] Connecticut is one of several states which imposes a retailers' sales and use tax at a statutorily fixed rate against personal property purchased or used within the state. The statute under which such taxes are imposed by Connecticut is the Education, Welfare and Public Health Tax Act (Chap. 219, Conn. Gen. Stat. Rev. of 1958, as amended) commonly referred to as the "Sales and Use Tax Act" (§§ 12-406 to 432 Conn. Gen. Stat. Anno. 1958).

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[2]A Stipulation of Facts, dated May 24, 1967, is incorporated into this opinion.

[3]The "trade business" proviso is not applicable here.

This case presents the question whether the provisions of the Soldiers' and Sailors' Civil Relief Act bars the defendants from collecting Connecticut sales and use taxes from nonresident servicemen present here in compliance with military orders.

## I.

The key provision upon which the plaintiffs rely is part of a comprehensive remedial statute designed "to protect those who have been obliged to drop their own affairs and take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). *Cf. LeMaistre* v. *Leffers*, 333 U.S. 1, 6 (1943). It is found in Section 514(1) (50 App. U.S.C. § 574 (1) ) of the Soldiers' and Sailors' Civil Relief Act:

> "For the purpose of taxation in respect of *personal property* . . . of any such [military] person by any State, Territory, possession, or political subdivision of any of the foregoing, . . . of which such person is not a resident or in which he is not domiciled . . ., [his] *personal property shall* not be deemed to be located or present in or to *have a situs for taxation in such State, Territory, possession or political subdivision* . . . . (Emphasis added).

The emphasized words were added to the original version of the Soldiers' and Sailors' Civil Relief Act by amendment on July 3, 1944 (58 Stat. 722). A major reason for the enactment of the amendment was that the prior law did "not prevent the State of 'temporary residence' from taxing tangible personal property actually located in such State so long as the tax does not depend on residence or domicile." S. Rep. No. 959, 78th Cong. 2d Session. 1 (1944). See H.R. Rep. No. 1514, 78th Cong. 2d Sess. 2 (1944).

When the section was amended again in 1962 (76 Stat.

768, Oct. 9, 1962)[4], it was subjected to legislative scrutiny without touching this particular provision because the Senate Committee regarded it as already making it "clear that a serviceman, living with his family and owning personal property in a State other than his State of domicile, is not subject to taxation on his personal property by the nondomiciliary State."; S. Rep. No. 2182, 87th Cong. 2d Sess. 1 (1962), accompanying H.R. 9747, U.S. Code Cong. & Adm. News 1962, p. 2841. Such approval by a legislative body is meaningful. *Cf. Electric Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14 (1939).

## II.

Connecticut's use tax is an excise "imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer for storage, use or other consumption in this state. . . ." Conn. Gen. Stat. § 12-411. See *Stetson* v. *Sullivan*, 152 Conn. 649, 211 A. 2d 685 (1965).

Although in the words of the statute a sales tax is imposed "for the privilege of selling tangible personal property at retail . . . ," Conn. Gen. Stat. § 12-408(1), the retailer is required to collect the tax from the consumer, and the consumer is obligated to pay the tax to the retailer. Conn. Gen. Stat. § 12-408(2). Both sales and use taxes are at the rate of 3-½% of the sales price.

The defendants contend that Connecticut's sales and use taxes do not fall within the scope of the federal statute's ban against taxation "in respect of personal property."

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[4]The 1962 Amendment, not relevant here, provided that a serviceman domiciled in State Y, with a "temporary residence" in State X could not be subjected to a personal property tax by State X, when the serviceman was temporarily out at sea or assigned to a third State but had left his family and personal property behind in State X. 76 Stat. 768 (1962). See *United States* v. *Arlington County*, supra, 326 F. 2d 929.

The breadth and sweep of this phrase has widened under the impact of two recent Supreme Court cases. In *Dameron* v. *Brodhead,* 345 U.S. 322 (1953), the petitioner was a commissioned officer of the United States Air Force, who resided in Denver, Colorado, while stationed at a nearby base. The local taxing authority assessed a tax on certain household goods comprising petitioner's personal property. This was duly paid. In the subsequent suit for refund, the state argued that the Soldiers' and Sailors' Civil Relief Act did not bar the tax since Louisiana, the state of petitioner's domicile, had not taxed the property. The federal law, it was argued, barred only multiple taxation and if the state of permanent residence or domicile did not tax, the state of "temporary residence" was free to do so. The Suprme Court rejected this narrow construction:

> "In fact, though the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right. Congress, manifestly, thought that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces." *Dameron* v. *Brodhead,* supra, 345 U.S. at 326.

The state would distinguish *Dameron* from this case since the tax there was a recurring personal property tax, not a one-time excise imposed upon a transaction or registration. Such a distinction cannot survive the facts and logic of *California* v. *Buzard,* 382 U.S. 386 (1966).

The state tax in *Buzard* was a 2% "license fee" imposed by California Revenue and Taxation Code in addition to an

$8.00 fee for the registration of an automobile. The Supreme Court was primarily concerned with § 514(2)(b) of the Soldiers' and Sailors' Civil Relief Act,[5] which allows the state of "temporary residence" to impose a "license, fee, or excise" if such a tax is (1) owing to and assessed by the home state, and (2) not yet paid to the home state by the serviceman. The Supreme Court limited the tax that could be assessed under § 514(2)(b) to the amount needed to support the functioning of the licensing and registration procedures of the state of "temporary residence." California was not permitted to assess a "license fee" under the proviso in § 514(2)(b) against an automobile owned by a non-resident serviceman in connection with registration of that automobile where the 2% tax imposed was for general revenue purposes.

The Court ruled at the outset of its opinion that California could collect the 2% tax "*only* if it . . . [was] a 'license, fee, or excise' on a motor vehicle or its use." (382 U.S. 392-93). Since the sole tax which could legally be imposed on motor vehicles was that allowed by § 514(2)(b) and the amount of this tax was limited to that necessarily incident to registration and licensing of vehicles, the implication that no additional amount could be taxed for the use of the automobile is clear.

No viable distinction can be drawn between automobiles and other forms of personal property. The import of *Buzard* is that a state may not tax personal property of non-resident servicemen under any label, except within the limited and sharply defined registration and license exceptions contained in § 514(2)(b).

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[5]Section 514(2)(b) (50 App. U. S. C. § 574(2)(b)) provides: "The term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided*, that the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid."

The Connecticut use tax (§ 12-411 et seq.) on the "storage, use or other consumption" of personal property in this state is therefore a tax prohibited by federal law from being imposed on nonresident servicemen.

## III.

The state argues that the sales tax (§ 12-408 et seq.) is a tax on the transaction of purchase and not upon the ownership of personal property. This position must be rejected. Although imposed initially on the retailer "for the privilege of selling tangible personal property at retail" (§ 12-408(1) ), the ultimate incidence of this tax falls on the purchaser from whom the retailer is required by statute to collect reimbursement (§12-408(2) ). The Connecticut Supreme Court has conceded the ultimate incidence of the sales tax and has ruled that where the Federal Government is the ultimate purchaser, no tax can be levied. *Avco Mfg. Corp.* v. *Connelly,* 145 Conn. 161, 140 A. 2d 479 (1958).

Although the sales tax and use tax are distinct provisions, in terms and in concept for some purposes (see *Connecticut Light & Power Co.* v. *Walsh,* 134 Conn. 295, 300, 57 A. 2d 128 (1948) ) in practical effect they are complementary and designed to promote equality of taxation on personal property whether purchased in state or out of state. *Avco Mfg. Corp.* v. *Connelly,* supra at 172.

Moreover, Connecticut imposes a use tax rather than a sales tax on the purchase of a motor vehicle, boat or airplane from other than a licensed dealer. Conn. Gen. Stat. § 12-431. Connecticut has merged the purposes and imposition of the sales and use taxes to such an extent that they are but one tax in practical effect. Any distinction between them in the context of this case would be one of form only, not of substance. The bulk of proceeds of both taxes are used indiscriminately

to promote the public health, welfare and education and for no other purpose. (§ 12-432).

Each tax hits with equivalent impact on the personal property of a nonresident serviceman. The fact that the statutory scheme for payment of the sales tax which puts the burden of collecting it on the retailer, with the right to enforce its payment by suit against the buyer, is substituted for a lien on the property itself hardly establishes that the property is not being taxed. *Cf. United States* v. *Allegheny County*, 322 U.S. 174, 187 (1944). And, although generally a property tax differs from a sales tax in being a recurrent annual demand on capital value instead of a single exaction on the initial transaction whereby ownership rights are acquired, in either case both legal incidence of the tax and the economic burden is imposed on the vendee. The difference in the rate does not change the incidence of the tax. Under whatever method the tax is enforced, or by whatever form its subject may be described, in substance the amount of the tax assessed is precisely determined by the value of the property. No matter which attribute of possessory interest in the property is hit — initial acquisition of ownership, or continued retention — it is always the nonresident serviceman who is hurt when the tax is levied.

Any confusion about concepts and definitions is considerably clarified by the rationale of the Soldiers' and Sailors' Civil Relief Act. The Congress was not measuring the exemption against particular concrete forms a state's tax might take. The rationale for the exception resulting in a certain measure of favored tax treatment which clearly emerges from the statute is that a nonresident serviceman should be exempt from "the burden of supporting the government of the States where he was present solely in compliance with military orders." *California* v. *Buzard*, supra, 382 U.S. at 393. *Dameron* v. *Brodhead*, supra, 345 U.S. 322.

Reading § 514 "with an eye friendly to those who dropped their affairs to anwer their country's call," *LeMaistre* v. *Leffers*, supra, 333 U.S. at 6, the imposition of the sales tax and the use tax must yield to the mandate of Congress. Accordingly, I hold that the phrase "taxation in respect of personal property" in § 514 embraces Connecticut's "Sales and Use" taxes.

## IV.

The state also argues that Congress in enacting the Buck Act (4 U.S.C. §§104-110) has conferred upon the states jurisdiction to collect sales and use taxes "in any Federal area." 4 U.S.C. § 105. The Buck Act, it is contended, would conflict with any construction of the Soldiers' and Sailors' Civil Relief Act which would bar a state from collecting sales and use taxes. The adage that conflicting statutes must be construed so as to give effect to both is invoked. *United States* v. *Zacks*, 375 U.S. 59, 67-68 (1963). Accordingly, it is argued, the Soldiers' and Sailors' Civil Relief Act should not be construed to apply to sales and use taxes in order to avoid a conflict of federal statutes.

Section 105 of the Buck Act merely provides that no person "shall be relieved from liability . . . on the ground that the sale or use . . . occurred in whole or in part within a Federal area. . . ." The Soldiers' and Sailors' Civil Relief Act, however, gives relief from liability on an entirely different ground, namely, that the person taxed is a non-resident serviceman. The scope and purpose of the two statutes are entirely separate and distinct. There is no conflict between them. In granting states permission to impose sales taxes within the federal enclave Congress did not say that it granted authority to impose taxes on sales to nonresident servicemen generally.

## V.

The state raises an affirmative defense that the Government is barred from bringing this suite under the doctrine of laches. The relevant words of § 514(1) (50 App. U.S.C. § 574 (1) ) were added by amendment in 1944 and the Connecticut Sales and Use tax was enacted in 1947. Connecticut has, therefore, been collecting these taxes for twenty years. So the state argues. But the ostensible illegality of these assessments may not have become obvious until the very recent decisions of the United States Supreme Court in *Dameron* and *Buzard*. However, a decision on the merits as to whether laches existed need not be made.

It is a matter of well-settled law that the "United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940). The principle has its roots deep in the common law. It is epitomized in the ancient maxim: *Nullum tempus occurrit regi*.[6] Today, the rule is not based so much on the prerogative of the sovereign as on the needs of public policy. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938); *United States* v. *Thompson*, 98 U.S. 486 (1878). The principle was very recently confirmed in *Costello* v. *United States*, 365 U.S. 265, 281 (1961). In summary, the United States, as sovereign, is not subject to a defense of laches when it sues. That defense may not be interposed here.

But conceding that the Government may pursue this action for a declaratory judgment, it does not follow that indi-

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[6]An excellent analysis of the history and policy of the rule and maxim is to be found in *Guaranty Trust Co.* v. *United States*, supra, 304 U. S. at 132. Justice Stone traces its development from the *Magdalen College Case*, 11 Co. Rep. 66b, 74b and Bracton, De Legibus, Lib. ii, c. 5, § 7, down to the opinion of Judge Story in *United States* v. *Hoar*, Fed. Cas. No. 15, 373, pp. 329, 330. Judge Story states that the reason for the rule is "to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers."

vidual servicemen may ignore the state procedure in claiming refunds for taxes already paid.

> "No refund shall be allowed unless a claim therefor is filed with the commissioner within three years from the last day of the month succeeding the quarterly period for which the overpayment was made, or, with respect to assessment made under sections 12-415 and 12-416, within six months after the assessments become final, or within six month from the date of overpayment, whichever period expires later. No credit shall be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the commissioner within such period, or unless the credit relates to a period for which a waiver is given pursuant to subsection (8) of section 12-415." Conn. Gen. Stat. § 12-425(2).

State law has been given effect as controlling the assessment date for property taxes even when a congressional exemption existed after a specified date. *Board of County Commissioners* v. *Seber*, 130 F. 2d 663, 670 (10th Cir. 1942), aff'd. 318 U.S. 705 (1943). Also,

> "In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in relations with the states or their political subdivisions." *Jackson County* v. *United States*, 308 U.S. 343, 352 (1939).

The Supreme Court explicitly avoided deciding the applicability of the state statute of limitations in a suit brought by private litigants to recover state taxes assessed and collected in violation of a specified federal exemption. *Ward* v. *Love County*, 253 U.S. 17, 25 (1920).

Moreover, the beneficiaries of the federally created exemption from state taxes in *Seber, Ward,* and *Jackson County* were American Indians. These people have long occupied a special position as wards of the United States.[7] A particularly favorable construction is to be accorded tax exemptions secured to the Indian people. *Carpenter* v. *Shaw,* 280 U.S. 363, 366-67 (1930). But, although a state cannot invalidate a federally created right, state law may implement its exercise in the interest of orderly administration.[8] *Board of County Commissioners* v. *Seber,* supra, 130 F. 2d at 670; see *Jackson County* v. *United States,* supra, 308 U.S. at 351-52 (Mr. Justice Frankfurter).

Accordingly, an individual serviceman seeking to recover sales and use taxes paid to Connecticut must comply with the three year statute and the procedure outlined in Conn. Gen. Stat. § 12-425(2). Connecticut law does not require formal protest[9] at time of payment in order to recover taxes paid, provided a claim for refund is made within the time specified in § 12-425(2).

## VI.

A final point remains to be considered. Besides the United States of America, Lt. Stanley D. Schuman, U.S.N., is a party plaintiff who sues for himself and on behalf of all servicemen or former servicemen similarly situated and affected, too numerous to be made parties. There undoubtedly are attributes to this action by him which would have been sufficient to

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[7]See the opinion of Mr. Justice Black in *Jackson County* v. *United States,* supra, 308 U.S. at 353. See also *Board of County Commissioners* v. *Seber,* supra, 318 U.S. at 715.

[8]This principle is applicable at least when the suit is by a private litigant, even if not controlling in a suit by the United States. *Compare City of New Orleans* v. *United States,* 371 F. 2d 21, 28 (5th Cir. 1967) *with United States* v. *Cocreham,* 247 F. Supp. 731, (E.D. La. 1965).

[9]See *District of Columbia* v. *McFall,* 188 F. 2d 991, 992 (D.C. Cir. 1951).

meet the prerequisites of Rule 23(a), Fed. R. Civ. P., for a class action,[10] and this case also fits neatly within the additional requirement of Rule 23(b)(2):

> [T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;"

But there is a significant deficiency in the pleadings. Even if this were to be treated as a class action brought by Lt. Schuman so as to permit aggregation of all the individual claims in order to establish the requisite jurisdictional amount under either 28 U.S.C. §§ 1331 or 1332, this amount is not alleged to be in controversy. Considering that his own claim is for $21.53, an assumption that the requisite amount must exist is somewhat speculative. More significantly, the eleventh amendment forbids a suit by a private individual against a state in the federal courts. Nor does Connecticut's consent to be sued in its own court (Conn. Gen. Stat. § 12-422) impart its consent to be sued in a federal court. *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47, 54 (1944; *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459, 465 (1945). Schuman's claim is dismissed for lack of jurisdiction without prejudice to his claim against the State of Connecticut.

The litigious situation presented by this case will be quite as fully benefited as a practical matter by granting the relief sought by the Government, for that will settle the legality of the state's refusal to honor the exemption from its sales

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[10]Rule 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

and use taxes which § 514 of the Soldiers' and Sailors' Civil Relief Act requires. Commendably, counsel for both parties have agreed that declaratory relief rather than injunctive relief will suffice to secure the state's ready compliance with the court's ruling.

Accordingly, the court

DECREES and ADJUDGES that judgment enter declaring that each and all assessments and collections of sales or use taxes which defendants have made and are making in respect of personal property purchased or used in Connecticut by Schuman and other persons, who, at the time as of which the tax was or is levied, were or are members of the Armed Forces of the United States on active duty and residents of or domiciled in states other than Connecticut and absent from such states other than Connecticut and absent from such states solely by reason of compliance with military or naval orders, were and are in contravention of the Soldiers' and Sailors Civil Relief Act of 1940.

Dated at Hartford, Connecticut, this 28th day of June, 1967.

M. JOSEPH BLUMENFELD
*United States District Judge*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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| UNITED STATES OF AMERICA<br>— vs —<br>JOHN L. SULLIVAN, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, ET AL | CIVIL NO. 11,928 |

# JUDGMENT

This action came on for trial before the Court, Honorable M. Joseph Blumenfeld, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, and the Court having directed that judgment enter in accordance with its decision,

It is ORDERED, ADJUDGED and DECREED that each and all assessments and collections of sales or use taxes which defendants have made and are making in respect of personal property purchased or used in Connecticut by Schuman and other persons, who, at the time as of which the tax was or is levied, were or are members of the Armed Forces of the United States on active duty and residents of or domiciled in states other than Connecticut and absent from such states solely by reason of compliance with military or naval orders, were and are in contravention of the Soldiers' and Sailors' Civil Relief Act of 1940.

Dated at New Haven, Connecticut this 29th day of June, 1967.

GILBERT C. EARL, *Clerk*

By THOMAS A. GRIMES
*Chief Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

— VS —

JOHN L. SULLIVAN, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, ET AL

CIVIL NO. 11,928

# ORDER

The plaintiff having, on July 10, 1967, moved this Court for an order amending the judgment herein dated June 29, 1967; and the matter having come on to be heard in open court on September 11, 1967; and counsel for plaintiff having acknowledged that it is plaintiff's understanding that defendants' time to appeal will not begin to run until the entry of this order; now, therefore, its is

ORDERED that defendants may continue to collect sales and use taxes from non-resident Servicemen pending the ultimate determination of this action in any Appellate Court which may take jurisdiction thereof; provided that if this Court's judgment that such taxes may not be collected from non-resident Servicemen is ultimately sustained, the State of Connecticut shall refund to non-resident Servicemen all sales and use taxes paid by them at any time since June 28, 1964, upon their filing an application therefor not later than three (3) years following the ultimate determination of this matter, consisting of

(a) a receipt or other evidence showing the purchase of tangible property and the payment of the tax to the State of Connecticut or to a Connecticut retailer; and

(b) a certification by the applicant's Commanding Officer, or other evidence, that at the time of purchase the applicant was a Serviceman on active duty and not a resident of Connecticut.

And, it is FURTHER ORDERED that the judgment herein dated June 29, 1967 be and hereby is amended to conform to the provisions of this Order.

Dated at Hartford, Connecticut, this 2nd day of October, 1967.

M. Joseph Blumenfeld

M. JOSEPH BLUMENFELD
*United States District Judge*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 427 — September Term, 1967.

(Argued May 16, 1968 Decided July 10, 1968.)

Docket No. 32007

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UNITED STATES OF AMERICA, and LIEUTENANT STANLEY D. SCHUMAN, U. S. N., a member of the armed forces of the United States on active military service not a resident of or domiciled in the State of Connecticut, suing on behalf of himself and all servicemen or former servicemen similarly situated and affected,

*Plaintiffs-Appellees,*

— against —

JOHN L. SULLIVAN, Tax Commissioner of the State of Connecticut; GERALD A. LAMB, Treasurer of the State of Connecticut; LOUIS I. GLADSTONE, Comptroller of the State of Connecticut; and ROBERT K. KILLIAN, Attorney General of the State of Connecticut,

*Defendants-Appellants.*

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Before:

MOORE, HAYS and FEINBERG,

*Circuit Judges.*

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Appeal from a judgment of the United State District Court for the District of Connecticut, M. Joseph Blumenfeld, J., which granted the government's motion for summary

judgment declaring that collection of Connecticut's sales and use taxes from nonresident servicemen present in the state solely pursuant to military orders contravened section 514 of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. App. § 574. Affirmed.

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FEINBERG, *Circuit Judge*:

This case was brought by the United States of America[1] against various officials of the State of Connecticut to determine whether servicemen present in Connecticut solely by reason of military orders are subject to Connecticut's sales and use taxes. The United States District Court for the District of Connecticut, M. Joseph Blumenfeld, J., granted the motion of the United States for summary judgment, 270 F. Supp. 236 (1967), on the ground that collection of such taxes contravened section 514 of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. App. §574[2] Defendants appealed; we affirm.

Like most states, Connecticut levies a broad pattern of sales and use taxes on its residents. Conn. Gen. Stats. §§12-406 to -432a. With certain exceptions, all retail sales of tangible personal property are subject to the sales tax. The retailer pays the state three and one-half per cent of his gross receipts on goods subject to the tax, section 12-408(1); in turn, he is entitled to reimbursement from the customer. Sections 12-408(2), (3). The use tax, section 12-411, is imposed at the

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[1]Lieutenant Stanley D. Schuman, U. S. N., was also a plaintiff below, having brought a class action pursuant to Fed. R. Civ. P. 23 on behalf of himself and all other servicemen similarly situated. The district court dismissed his complaint for lack of jurisdiction, and no appeal has been taken.

[2]Plaintiff also sought an injunction against further collections of the taxes; before the decision, however, counsel for both parties agreed that declaratory relief would suffice to secure the state's compliance. The court permitted Connecticut to continue collecting the taxes pending the outcome of the appeal. It has been stipulated that if the district court's decision is ultimately upheld, all taxes improperly collected since June 28, 1964, will be refunded upon proper application.

same rate on the "storage, use or other consumption" in Connecticut of "tangible personal property" purchased from a retailer for such storage, use or other consumption. Under the use tax, the customer is directly liable to the state, although if the purchase is made from a Connecticut retailer who collects the tax, the customer is relieved of liability. Section 12-411 (2). Sales of motor vehicles, boats and airplanes from other than licensed dealers are also subject to the use tax. Section 12-431. When a Connecticut sales tax has been collected, the use tax does not apply. Section 12-413(1). Finally, whether a sales or use tax has been collected, all proceeds are to be used exclusively for "public health, welfare and education purposes." Section 12-432.

In the district court, the United States offered some examples of the imposition of these taxes on naval personnel domiciled in other jurisdictions but stationed in Connecticut. Lieutenant Stanley D. Schuman of Nebraska[3] and Commander Kent J. Carroll of Michigan both purchased used motorboats in Connecticut from non-dealers. Schuman paid the use tax under protest; Carroll refused to pay. Commander Clyde H. Shaffer of Pennsylvania purchased a new car from a Connecticut dealer who collected the sales tax. Commander Jerome W. Roloff of Wisconsin bought a used car in Florida, and paid a sales tax there. When he subsequently registered the car in Connecticut, he was required to pay the difference between the Florida sales tax and the Connecticut use tax. Finally, Commander William L. Foster purchased a new car from a Connecticut dealer and at the same time registered it in Texas, his home state, paying a Texas sales tax. Nevertheless, the dealer collected a full Connecticut tax.

The sole question on appeal is whether these purchases, and others like them, were exempt from Connecticut's sales

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[3]Schuman at the time of filing the complaint was both a domiciliary and resident of Nesbraska; the other personnel listed above had similar connections with their states of origin.

and use taxes because of section 514 of the Soldiers' and Sailors' Civil Relief Act.[4] In relevant part, that section provides, 50 U. S. C. App. § 574:

> (1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income by any State . . . such person shall not be deemed to have lost a residence or domicile in any State . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State . . . while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income or gross income of any such person by any State . . . of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State . . . and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State . . . . Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: *Provided*, That nothing contained in this section shall prevent taxation by any State . . . in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. . . .
>
> (2) When used in this section, (a) the term "per-

[4] It has been stipulated that Connecticut cannot tax sales to servicemen made by military exchanges or commissaries operated by the armed services on military installations. Such sales are exempt under the Buck Act, 4 U. S. C. § 107.

sonal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided*, That the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid.

The basic purpose of section 514, as it now reads, is clear from its wording and structure. It defines the residence of servicemen, the source of their income, the situs of their property, and the nature of taxation, all for the purpose of exempting servicemen from certain forms of taxation by states in which they are stationed. Section 514(1) first provides that a serviceman shall not lose his home state residence or domicile because of absence due to military orders. Correlatively, it also states that he shall not acquire a residence or domicile in a host state because of his presence there under the same military requirement. It then illustrates the consequences of these provisions. For the purpose of state taxation on income, compensation for military service "shall not be deemed income . . . from sources within" any state of which the serviceman is not a resident. For the purpose of taxation "with respect to personal property, or the use thereof," that property shall not be deemed "to have a situs for taxation" in the host state. Thus, section 514(1) eliminates jurisdictional grounds that otherwise could support taxation by the host state related to the income or personal property of a serviceman. The broad nature of section 514(1) is also made clear by the definitions in section 514(2), which provide that "the term 'personal property' shall include tangible and intangible property (including motor vehicles)," and that "the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof."[5]

[5]Subsection (2) was added to § 514 in 1944, as discussed below.

In considering whether Connecticut's sales and use taxes are affected by section 514, we turn from its broad design to its details, recognizing that while the face of the statute is not always the end of its interpretation, cf. *In re Miracle Mart, Inc.*, Slip Op. 2533 (2d Cir. June 3, 1968), it is undeniably a good place to start. In arguing that nonresident servicemen stationed in Connecticut are exempt from these state taxes, the United States relies on the language of section 514, which by its terms affects taxation "in respect of . . . personal property." The Connecticut use tax is explicitly levied on the storage, use or consumption in Connecticut of "tangible personal property" purchased from a retailer for such use, and the amount of tax is computed by reference to the "sales price of the property." By its very terms, this is a tax "in respect of . . . personal property." The statutory phrase has a generous reach. The United States argues that it would seem to encompass all taxes, no matter how labelled, which pertain or relate to personal property, rather than to be limited to taxes *on* personal property. Certainly, if a nonresident serviceman's personal property is deemed, in the words of the statute, not to be present in the state, it would be difficult to justify a use tax on it. We realize that this begs the question, for such ghostly absence is allowed only for the purpose of specified taxes, whose definition we must construe. But the assumption helps to show the connection between the tax and the physical presence in the state of the personal property, a taxable nexus which seems to fall within the broad phrase "in respect of . . . personal property." Congress clearly had in mind the breadth of that language in removing from its effect taxes on a trade or business.[6] Moreover, section 514 twice specifically envisions the possibility of taxes involving the

[6]Thus, section 514 also states: *Provided*, That nothing contained in this section shall prevent taxation by any State . . . in respect of personel property used in or arising from a trade or business, if it otherwise has jurisdiction.

"use" of property. Thus, subsection (1) states that the exemption from state taxation applies to taxation:

> with respect to personal property, *or the use thereof*, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such [military] orders . . . . [Emphasis added.][7]

Similarly, subsection (2) states that:

> the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles *or the use thereof* . . . . [Emphasis added.]

The Connecticut sales tax, which is incurred at the time of purchase, is in terms based upon the retailer's privilege of sale, but what he must sell is "tangible personal property." Moreover, whatever the conceptual basis may be, the tax is in reality also assessed against the buyer of the "tangible personal property," as the Connecticut Supreme Court has held, see *Avco Mfg. Corp.* v. *Connelly*, 140 A. 2d 479, 484 (Conn. 1958), and as the statute explicitly requires. Section 12-408(2). See also *First Agricultural Nat'l Bank* v. *State Tax Commission*, 36 U. S. L. W. 4686, 4688-89 (U. S. June 17, 1968). Judge Blumenfeld pointed out in his thorough opinion, 270 F. Supp. at 243-44, that the sales and use taxes are:

> [C]omplementary and designed to promote equality of taxation on personal property whether purchased in state or out of state. . . . Connecticut has merged the purposes and imposition of the sales and use taxes to such an extent that they are but one tax in practical effect. Any distinction between them in the context of this case would be one of form only, not of substance. . . .

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[7]This language was added to § 514 in 1962, under circumstances discussed below.

> Each tax hits with equivalent impact on the personal property of a nonresident serviceman. The fact that the statutory scheme for payment of the sales tax which puts the burden of collecting it on the retailer, with the right to enforce its payment by suit against the buyer, is substituted for a lien on the property itself hardly establishes that the property is not being taxed. . . . No matter which attribute of possessory interest in the property is hit — initial acquisition of ownership, or continued retention — it is always the nonresident serviceman who is hurt when the tax is levied. [Citations omitted.]

See also *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 66 (1963); *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 581-83 (1937). In addition, as with the use tax, the sales tax is computed as a percentage of the property's value, as approximated by its sales price. These basic characteristics indicate that the sales tax also falls within the definition of a tax "in respect of . . . personal property."

The state's argument to us makes much of the theoretical distinction between an income tax or a property tax, on the one hand, and a privilege tax, on the other. The point is made that section 514 recognizes this difference and affects only the former type, while a sales or use tax is obviously the latter. Of course, this distinction may be useful for analysis in some instances, but section 514 does not in terms make it.[8] Because a tax "in respect of" property would appear to be broader than a tax "on property, citations to show that a use tax is not a tax "on" property[9] are not controlling.

The language of section 514, therefore, is helpful to plaintiff United States rather than to Connecticut. However, the state finds support in the statute's silence on the subject

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[8]See also the discussion of *California* v. *Buzard*, 382 U. S. 386 (1966).
[9]E.g., *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582 (1937); *Connecticut Light & Power Co.* v. *Walsh*, 57 A. 2d 128 (Conn. 1948).

of sales and use taxes. It points out that when Congress in 1944 revised section 514 to read essentially as it does today, state sales and use taxation was already widespread. Therefore, argues the state, if Congress had intended to preclude such taxation of nonresident servicemen, it would have said so.

An argument based on silence is difficult to deal with, since inferences can be drawn either way; e.g., if Congress had wanted to allow state sales and use taxation, it could have said so in the proviso which permits normal "trade or business" taxes.[10] The legislative history is not informative on this specific point, for we find no mention of sales or use taxes. However, we do discern there a significant concern for the welfare of the serviceman, see, e.g., H. R. Rep. No. 2198, 77th Cong., 2d Sess. 2 (1942), consistent with the Supreme Court's instruction to us to read the Act "with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre* v. *Leffers*, 333 U. S. 1, 6 (1948). Section 514 was first enacted in 1942 to protect servicemen against the undue burdens of multiple taxation to which movement around the country under military orders might subject them.[11] In 1944, Congress amended the statute to make it absolutely clear that taxation in respect of nonresident servicemen's "personal" property was impermissible even if not based on the serviceman's residence or domicile.[12] Moreover, even though a contrary interpretation was possible, the Supreme Court later held in *Dameron* v. *Brodhead*, 345 U. S. 322, 326 (1953), that Congress did not restrict the statute's effect to actual incidents of double taxation:

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[10]See note 6 *supra*.

[11]See S. Rep. No. 1558, 77th Cong., 2d Sess. 11 (1942); H. R. Rep. No. 2198, 77th Cong., 2d Sess. 6 (1942); Hearings on H. R. 7029 Before the House Committee on Military Affairs, 77th Cong., 2d Sess. 28 (1942).

[12]See S. Rep. No. 959, 78th Cong., 2d Sess. 1 (1944); H. Rep. No. 1514, 78th Cong., 2d Sess. 2 (1944).

> In fact, though the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right. Congress, manifestly, though that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces. [Footnote omitted.]

In 1962, Congress felt it necessary to clarify the statute even further. A naval officer from New Jersey, stationed in Arlington, Virginia, had been on sea duty for over a year. While he was so engaged, Arlington County assessed a tax on the personal property that he had left in Virginia with his family. The county claimed that since the officer was no longer in Arlington under military orders, his personal property was not exempt from taxation, even though it could not have been taxed while he was there. The case was brought to the attention of Congress, which added the following sentence to subsection (1) of section 514:

> Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders . . . .

The new sentence was broader than the facts required, since it explicitly referred to the "use" of personal property as an object of the federal exemption, even though the Arlington case did not involve a use tax. As already noted, this added

language literally applies to the appeal now before us, whether or not Congress intended to broaden section 514. Plaintiff United States points out that if Congress only intended to clarify the statute, as seems to be the case,[13] then this supports the view that the statute already covered use taxes.[14] Otherwise, the logical conclusion would be that Congress simply made a mistake when it included the phrase "or the use thereof," an assumption which ignores the fact that the same phrase had already been in subsection (2) of section 514 for many years.

The most recent discussion of legislative intent appears in *California* v. *Buzard*, 382 U. S. 386 (1966). The Court there considered motor vehicle registration and license fees which had been imposed by California on an Air Force Captain from Washington. The car in question had been purchased in Alabama and brought to California; since it had never been in Washington, there was no duty to register it in that state. The Court construed section 514(2)(b) to mean that an automobile had to be registered in either the home state or the host state. Subsection (2) was added to section 514 in 1944 as part of the clarifying amendments which specifically stated that the exemption of section 514 applied to taxes relating to "personal" property. See note 12 *supra* and accompanying text. Subsection (2)(b) provides that the "taxation" referred to in section 514(1) includes "licenses, fees, or excises imposed in respect to motor vehicles or the use thereof . . . ." Then a proviso adds:

> *Provided*, That the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid.

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[13] See S. Rep. No. 2182, 87th Cong., 2d Sess. 1 (1962); H. R. Rep. No. 2126, 87th Cong., 2d Sess. 2 (1962).

[14] The case that gave rise to the 1962 amendment was eventually decided in *United States* v. *Arlington County*, 326 F. 2d 929 (4th Cir. 1964). The court there held that tax was barred even under the language before amendment.

Thus, the exemption for servicemen from motor vehicle taxes is explicitly stated in section 514(2)(b), and then modified in the proviso, to deal with a specific problem created by the breadth of section 514(1): whether a serviceman can escape all registration by keeping his car out of his home state.

The Court concluded in *Buzard* that the effect of the proviso to section 514(2)(b) was to narrow the exemption from state taxation granted by section 514(1). Thus, a host state could tax a serviceman's car for registration purposes if his home state had not done so. 382 U. S. at 391-92. However, the Court limited the effect of the proviso to taxes which were necessary to registration. California's license fee of two per cent "of the market value of the vehicle" was, under state law, not imposed as a tax "essential to the registration and licensing of the . . . vehicle." Rather, it served the state's revenue interests and was "raised to defray the general expenses of government." *Id.* at 395-96. The Court pointed out, id. at 393, that the license fee[15] there involved did not come within the exception to section 514(1)'s exemption because:

> The very purpose of § 514 in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the States where he was present solely in compliance with military orders.

Consequently, the Court held that the California motor vehicle tax there under consideration was barred by section 514.

The language and approach of the Court in *Buzard* strongly suggest that but for the proviso to section 514(2)(b), the host state could not tax a nonresident serviceman's ve-

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[15]The facts in *Buzard* did not require the Court to consider whether California's "registration fee" of $8.00 was in a different category.

hicle at all because motor vehicles are obviously personal property. Although the taxes in the instant case are non-recurring, while those in *Buzard* appear to have been annual,[16] we think *Buzard* is broad enough to rule here. Connecticut's sales and use taxes are imposed for general revenue purposes; imposing such taxes on non-resident servicemen improperly places the burden of supporting Connecticut upon their shoulders. In addition, it is significant that the tax in *Buzard* was explicitly labelled a "privilege" tax;[17] yet the Court held that the broad language of section 514 barred its application to the Captain.

We conclude that the language and the spirit of section 514 call for affirmance of Judge Blumenfeld's decision. Connecticut contended at oral argument that this will cause immense administrative problems in differentiating non-resident servicemen from other customers. We do not think these problems insurmountable, or even seriously burdensome. In fact, Connecticut has already exempted other groups from its sales and use taxes, and no ill effect from these exemptions has been brought to our attention. See sections 12-412 (a) (the United States, the state or subdivisions), (e) (nonprofit charitable hospitals), (h) charitable and religious organizations).

The judgment below is affirmed.

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[16]California's Revenue & Taxation Code provides, in part: § 10751. A license fee is hereby imposed *for the privilege* of operating upon the public highways in this State any vehicle of a type which is subject to registration under the Vehicle Code.
§ 10752. The *annual* amount of the license fee shall be a sum equal to two (2) percent of the market value of the vehicle as determined by the department. [ Emphasis addd. ]

[17]See note 16 *supra*.

# United States Court of Appeals

For The

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of July one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,

*Circuit Judges.*

UNITED STATES OF AMERICA, ET AL.,

*Plaintiffs-Appellees,*

v.

JOHN L. SULLIVAN, Tax Commissioner of the State of Connecticut, GERALD A. LAMB, Treasurer of the State of Connecticut, LOUIS I. GLADSTONE, Comptroller of the State of Connecticut and ROBERT K. KILLIAN, Attorney General of the State of Connecticut,

*Defendants-Appellants.*

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellees.

/s/ A. DANIEL FUSARO
*Clerk*

# Supreme Court of the United States

No. 610, October Term 1968

JOHN L. SULLIVAN, Tax Commissioner of the State of Connecticut, et al.,

*Appellants,*

v.

UNITED STATES ET AL.

APPEAL from the United States Court of Appeals for the Second Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

January 13, 1969